IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re DAVID A. OLIVER and BETTY B. OLIVER, Debtors.	No. 95-21338 Chapter 13
DAVID and BETTY OLIVER, Plaintiffs, *vs*. GREEN TREE FINANCIAL SERVICING CORP., Defendant.	Adv. Pro. No. 98-2115

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court on the motion for summary judgment filed by the defendant, Green Tree Financial Servicing Corp. ("Green Tree"), on June 29, 1999. As discussed below, the motion will be denied in part as the court concludes that Green Tree has violated the automatic stay provided by 11 U.S.C. § 362(a). However, summary judgment in favor of Green Tree will be granted on the issue of whether the debtors are entitled to a return of payments made to Green Tree by the chapter 13 trustee pursuant to the terms of the debtors' confirmed plan subsequent to the debtors' surrender of their mobile home to Green Tree. Summary judgment will also be granted to Green Tree on the issue regarding the debtors' claim for lot rent in light of the debtors' concession that the issue is moot if Green Tree has resolved this matter directly with the lot owner and the uncontroverted evidence submitted by Green Tree establishing such a resolution. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A) and (0).

I.

The facts of this case, as set forth in the parties' memoranda of law, are largely undisputed. David and Betty Oliver filed for chapter 13 relief on August 31, 1995, thus initiating the bankruptcy case underlying the present adversary proceeding. The debtors' Schedule D indicated that they owed Green Tree the sum of $7,000.00 which debt was secured by a purchase money security interest in a 1984 Flintstone mobile home. On October 16, 1995, Green Tree filed a proof of claim in the amount of $6,353.11. Thereafter, on October 27, 1995, an order was entered confirming the debtors' chapter 13 plan, which provided, *inter alia*, for a monthly payment of $193.60 to Green Tree on a secured claim valued at $6,000.00 with 10% interest.

On November 12, 1997, Green Tree filed a motion for relief from stay alleging that the debtors were not making their payments. This motion was withdrawn by Green Tree without explanation on December 2, 1997. However, two weeks later on December 16, 1997, Green Tree filed a second motion for relief from stay alleging that the debtors had allowed the insurance on the mobile home to lapse, that the mobile home was depreciating and Green Tree had not been offered adequate protection, and that "[u]nless Green Tree Financial Servicing Corporation is allowed to foreclose upon its collateral, it will suffer

irreparable loss and harm." Accordingly, in the prayer for relief in its motion, Green Tree "move[ed] the Court for relief from stay, to be allowed to foreclose upon its collateral and to sell same in accordance with its agreement with the Debtors." The motion for relief was set for hearing on January 6, 1998.

Prior to the hearing on the motion for relief, the debtors filed on December 24, 1997, a document entitled "Modified Chapter 13 Plan" which stated on its face that "[t]he only provision in this plan to change is the surrender of the mobile home and the reduction of payments to the Chapter 13 Trust [sic] may secure other living arrangements [sic]." Instead of monthly payments to Green Tree, the purported modified plan provided that "Debtors will surrender the mobile home to the creditor." Because the modified plan was not accompanied by a motion and a notice as required by E.D. Tenn. LBR 3015-2, the court entered a order striking the modified plan on January 5, 1998.

When Green Tree's motion for relief came before the court for hearing on January 6, 1998, counsel for Green Tree announced that parties would be tendering an agreed order resolving the motion. The parties, however, did not submit the agreed order for entry until March 16, 1998. It states as follows:

ORDER OF SURRENDER AND FOR RELIEF FROM THE AUTOMATIC STAY

Comes the parties, as evidenced by the signatures of their counsel hereto, and would state to the court

> that the debtors now wish to surrender the mobile home to Green Tree Financial Servicing Corporation and agree that the automatic stay should be modified and it is
>
> ORDERED, ADJUDGED AND DECREED that Green Tree Financial Servicing Corporation is hereby granted relief from the automatic stay in this cause and should be allowed to repossess its collateral and to sell it in accordance with its agreement with the debtors and that debtor shall be permitted to file a modified Chapter 13 plan to reduce their payment to the Trustee by the amount of the mobile home payment so they may use these funds to secure other housing.

Subsequently on June 1, 1998, the debtors filed a "MOTION TO MODIFY CHAPTER 13 PLAN" along with a proposed "MODIFIED CHAPTER 13 PLAN" and "NOTICE" as required by E.D. Tenn. LBR 3015-2 which set a meeting with the chapter 13 trustee for June 16, 1998. The motion to modify plan stated that:

> Greentree has been granted relief from the stay and repossessed the debtor's mobile home in January 1998. For the remaining three months of the plan Greentree should receive no further payments so the debtors can use the payment to Greentree to rent another place to live. Their plan payment should be reduced by 193.60, the amount of the payment to Greentree.

The modified chapter 13 plan provided in paragraph 14 that the debtors surrender their mobile home to Greentree Acceptance [presumably Green Tree] with Greentree to have an allowed deficiency claim. The motion to modify was granted by order entered July 23, 1998.[1]

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[1]Under the local rules of this court, motions to modify (continued...)

On September 22, 1998, the debtors filed a complaint against Green Tree[2] commencing this adversary proceeding. The debtors allege in their complaint that after Green Tree filed its second motion for relief on December 16, 1997, counsel for the debtors advised Green Tree's counsel of the debtors' desire to surrender the mobile home and, despite this knowledge and the fact that the keys to the mobile home were turned over to Green Tree, Green Tree permitted the mobile home to remain where it was,

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[1](...continued)
confirmed chapter 13 plans are not set for hearing unless an objection to the motion is filed within twenty days of the filing of the motion. Absent timely objections, motions to modify are routinely granted without hearing upon recommendation by the chapter 13 trustee. *See* E.D. Tenn. LBR 3015-2. The record in the present case reflects that although no objections were filed to the debtors' motion to modify of June 1, 1998, the debtors filed a "SECOND MODIFICATION OF CHAPTER 13 PLAN" on July 6, 1998, which included two additional paragraphs. Paragraph 15 entitled "RESIDENTIAL MORTGAGE" states "[p]er paragraph 14 above, notices having been sent and no further payments are to be made to Greentree under this plan." Paragraph 16 provides that "[a]ny and all prior plan arrearages shall be forgiven." On July 7, 1998, the debtors filed an "AMENDED NOTICE" setting a meeting with the chapter 13 trustee on the second modification for July 14, 1998. After this meeting, the chapter 13 trustee tendered a proposed agreed order approving the modified plan, which order was entered by the court on July 23, 1998.

[2]The complaint also named the chapter 13 trustee as a defendant. On October 20, 1998, the trustee filed an answer and motion to dismiss averring that she was not an interested party. Because the debtors did not file a response to the motion to dismiss within the time provided by E.D. Tenn. LBR 7007-1 and the complaint did not appear to state a cause of action against the trustee, the motion to dismiss was granted by order entered November 17, 1998.

"causing the accruing of lot rent in the amount of $610.00 to the debtors' detriment, and for three months continued to receive and cash checks from the trustee for the monthly payment." The debtors further allege that after Green Tree received relief from the stay but before it "picked up" the mobile home, Green Tree made from ten to fifteen telephone calls to the debtors demanding payment. Accordingly, the debtors request in their complaint that the court determine that Green Tree willfully violated the automatic stay, that Green Tree be required to return payments they received from the chapter 13 trustee after the date of the order granting Green Tree relief from stay, and that "Greentree be held responsible for the lot rent accrued against Debtors for Greentrees [sic] failure to remove the mobile home promptly after being granted relief."

In its motion for summary judgment, Green Tree asserts that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on all issues. Green Tree notes that it is undisputed that all of Green Tree's telephone contacts with the debtors took place after relief from the stay was granted, that all of the contacts "were in furtherance of Green Tree's efforts to comply with the Order and repossess the mobile home" and that, therefore, Green Tree cannot be found to have violated the automatic stay. Green Tree

also argues that it has no legal obligation to refund payments made to it by the chapter 13 trustee after the stay order was entered because the payments were pursuant to a confirmed chapter 13 plan. With respect to the debtors' claim for lot rent, Green Tree maintains that this court does not have jurisdiction over the issue since it is not a core proceeding "as defined by 28 U.S.C. § 157" and irrespectively, the issue is now moot because Green Tree "has resolved the lot owner's claim for lot rent." To support its motion for summary judgment, Green Tree submits pertinent portions of the debtors' depositions and the affidavit of Joel E. Jordan, counsel for Green Tree.

In their memorandum of law filed in opposition to Green Tree's motion for summary judgment, the debtors dispute Green Tree's contention that all of its contacts with the debtors after it was granted stay relief "were in furtherance of Green Tree's efforts to ... repossess the mobile home." The debtors note that their uncontradicted deposition testimony establishes that the telephone calls which commenced April 23, 1998, were attempts by Green Tree to collect the balance owing to it and that in addition to the phone calls, Green Tree mailed statements directly to the debtors in August, September, and October 1998 advising them that their account with Green Tree

was seriously past due. The debtors maintain that orders granting relief from the stay should be strictly construed, that Green Tree was granted relief solely as to its collateral, and that the relief order should not be construed as a general grant of relief which would allow Green Tree to collect its debt from the debtors as if the bankruptcy filing had never occurred. The debtors also assert that case law supports their contention that Green Tree is not entitled to retain the plan payments it received after the mobile home was surrendered. Lastly, the debtors state that they were not served with a copy of the affidavit of Joel Jordan, but concede that their claim for lot rent would be moot if it has indeed been paid directly to the lot owner.

II.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a

light most favorable to the party opposing the motion. *See Schilling v. Jackson Oil Co. (In re Transport Assoc., Inc.),* 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994)(citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505 (1986)). *See also Street v. J.C. Bradford & Co.,* 886 F.2d 1472 (6th Cir. 1989). "[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but ... by affidavits or ... otherwise ..., must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). *See Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

III.

In support of their contention that Greentree violated the automatic stay notwithstanding the stay relief order, the debtors cite the cases of *In re Dalton*, 183 B.R. 127 (Bankr. S.D. Tex. 1995); *Bank of America Nat'l Trust and Savings Assoc. v. Virginia Hill Partners I (In re Virginia Hill Partners I)*, 110 B.R. 84 (Bankr. N.D. Ga. 1989); and *Matter of Dibbern*, 61 B.R. 730 (Bankr. D. Neb. 1986).

In *Virginia Hill*, the secured creditor requested and was granted relief from the stay in order to enforce its security interest in collateral. After foreclosing and selling the collateral, the creditor filed in state court an application to confirm the foreclosure sale which was the first step under Georgia law in obtaining a deficiency judgment against the debtor. The bankruptcy court found that the creditor's action violated the automatic stay, but refused to impose sanctions against the creditor, concluding that the violation was not willful because there was sufficient ambiguity in the stay relief order that the creditor might reasonably have concluded that it was authorized to proceed with the confirmation proceeding. *In re Virginia Hill Partners I*, 110 B.R. at 87-88.

Similarly, the bankruptcy court in *Dalton* held that the creditor's action in obtaining a personal judgment against the debtor in state court after it had obtained an order lifting the automatic stay to exercise its rights with respect to the collateral was in violation of the automatic stay and therefore void. *In re Dalton*, 183 B.R. at 129.

The issue before the court in *Dibbern* was whether a creditor who had been granted permission to commence foreclosure of a mortgage could also seek the appointment of a receiver pursuant to state law during the same proceeding. *Matter of Dibbern*, 61

B.R. at 731. The bankruptcy court answered the question in the negative, concluding that the creditor was in effect seeking two types of reliefs even though only one, *i.e.*, foreclosure, had been requested in the original motion. As stated by the court:

> The relief granted by the Court is limited to the prayer in the motion for relief. Therefore, if the prayer does not request permission to seek the appointment of a receiver, the order granting relief does not permit such action. In this case, that means that the Federal Land Bank's request for the appointment of a receiver was inappropriate and, if it desires authority to request a State Court appointment of a receiver, it must come back to Bankruptcy Court and make a specific request in a new motion for relief from the automatic stay.

Id.

In its reply brief, Green Tree seeks to distinguish these three cases from the facts of the instant case by stating that the creditors in the cited cases took action against the debtors outside the scope of the relief which they had been granted. Green Tree asserts that its actions did not violate the stay because this court's order provided that Green Tree "is hereby granted relief from the automatic stay in this cause." According to Green Tree, "[t]he additional language in the order that Green Tree could repossess and sell the collateral and that Debtors could modify the plan was not limiting language on the general order that the stay was lifted." Furthermore, argues Green Tree, "[n]one of Green Tree's contacts with the debtors

rise to the level of objectionable conduct in the cited cases."

After careful review of the motion for stay relief and order granting stay relief, the court finds for the debtors on this issue. When the court's order which "hereby granted [Green Tree] relief from the automatic stay in this cause" is properly read in context with the rest of the language contained in the order and is construed in conjunction with the motion giving rise to the order, it is clear that Green Tree was granted relief only to exercise its state law contractual rights in the collateral. There is nothing in either the motion or the order which would suggest that Green Tree was seeking relief to collect its debt from the debtors or that the court was granting such relief. As set forth in the various subsections of 11 U.S.C. § 362(a), the automatic stay prohibits a wide range of collection activities against the debtor and property of the estate. A grant of relief from the stay does not mean that the stay has been lifted in all respects and that the creditor may now undertake all previously prohibited activities, only those which have both been requested and authorized. *See Matter of Dibbern*, 61 B.R. at 731.

As stated by the court in *Virginia Partners*:

> Under Section 362(d) the court is authorized to grant relief from the stay for cause. The court can terminate, annul, modify, or condition the stay. 11

> U.S.C. § 362(d). Congress has given the court considerable flexibility to fashion relief to protect the interests of both the moving party, the debtor, and the debtor's estate....
>
> Ordinarily, stay relief to permit foreclosure, without more, carries no presumption that foreclosure confirmation proceedings or actions for a deficiency are also authorized. To the contrary, unless the stay relief order clearly provides otherwise, the determination and allowance of claims, deficiency or otherwise, against the debtor or its estate in the pending bankruptcy case remain with the exclusive jurisdiction of the bankruptcy court.

In re Virginia Hill Partners I, 110 B.R. at 87. *See also Wussler v. Silva (In re Silva)*, 215 B.R. 73, 78 (Bankr. D. Idaho 1997) (creditor's actions in asserting state court claim against chapter 7 trustee violated automatic stay because order terminating automatic stay was for sole purpose of litigating validity of state court default judgment against debtor); *In re Sparks*, 181 B.R. 341, 345 (Bankr. N.D. Ill. 1995)(debtor's estranged wife violated automatic stay by asking state court to enjoin debtor's sale of property even though spouse had requested and obtained order granting relief from stay to allow state court determination of marital dissolution issues).

Green Tree's observation that its contacts with the debtors were not as objectionable as those in the cited cases is only relevant to the extent of the damages sustained by the debtors, not to whether the stay has in fact been violated. In light of

this court's conclusion that Green Tree was granted relief from the stay for the limited purpose of exercising rights in its collateral, summary judgment in favor of Green Tree on this issue is clearly inappropriate. Furthermore, because Green Tree has offered no evidence contradicting the debtors' statements that Green Tree engaged in various efforts to collect its debt and Green Tree has not otherwise disputed that it contacted the debtors concerning collection of the debt, summary judgment in favor of the debtors on the issue of whether Green Tree has violated the automatic stay would be in order, but for the fact that the debtors have not sought summary judgment.

The court next turns to the issue of whether Green Tree must return the payments made to it by the chapter 13 trustee after the stay relief order was entered but prior to modification of the debtors' plan which provided for the surrender of the mobile home and the cessation of payments to Green Tree. In support of their assertion that Green Tree is not entitled to retain these payments, the debtors cite the case of *In re Jock*, 95 B.R. 75 (Bankr. M.D. Tenn. 1989). At issue in *Jock* was whether a chapter 13 debtor could modify a confirmed plan to surrender collateral to a secured claim holder and pay the deficiency as unsecured. The secured creditor argued that 11 U.S.C. § 1327(a), which provides that "[t]he provisions of a confirmed

plan bind the debtor and each creditor," prohibits such modifications after the original confirmation order becomes final. The *Jock* court held that rather than a limitation on modification, § 1327 was a statutory description of the effect of a confirmed plan. *Id*. at 77.

> A confirmed Chapter 13 plan binds the debtor (and all creditors), 11 U.S.C.S. § 1327(a), but a confirmed plan "may be modified ... at any time after confirmation of the plan but before the completion of payments under the plan...." 11 U.S.C.S. § 1329(a). The confirmed plan binds the debtor unless and until it is modified, and then the modified plan "becomes the plan," 11 U.S.C.S. § 1329(b)(2), and the modified plan has the effects described in § 1327.

Id. Because § 1325(a)(5)(C) permits a chapter 13 debtor to satisfy an allowed secured claim by surrendering the property securing the claim and the proposed modification otherwise met the confirmation requirements of § 1325(a), the court in *Jock* allowed the proposed modification. As a final note, the court added:

> Boatmen's Bank is entitled by § 1327(a) to the binding effect of the original confirmation order through the date the debtor surrendered the car. For each month through surrender of the car, the confirmed plan required the debtor to pay the bank $132.63. If that amount has not already been paid through the Chapter 13 trustee then it is due to the creditor through the plan as provided in the original confirmation order.

Id. at 78. Based on this quoted language, the debtors in the present case argue that Green Tree is only entitled to retain

payments through March 16, 1998, the date of the agreed order granting relief from the stay, and that Green Tree must return payments which it received in April, May, June, and July 1998 from the chapter 13 trustee.

Similar language in *In re Rimmer*, 143 B.R. 871 (Bankr. W.D. Tenn. 1992), also appears to support the debtors' argument. In ruling on an issue identical to the one before the court in *Jock*, the *Rimmer* court not only adopted the holding of *Jock*, but also cited the above-quoted language from *Jock* with approval:

> The Jock Court also reached an appropriate conclusion that the secured creditor "is entitled by § 1327(a) to the binding effect of the original confirmation order through the date the debtor surrendered the car." *Id*. Just as the debtor could not surrender collateral in a confirmed plan absent consent of the secured creditor or the approval by the court of the debtor's plan modification, the date of surrender of the collateral can not be forced upon the secured creditor without its consent or a judicial determination. As in the present case, if the debtor has not paid the secured creditor in compliance with the confirmed plan, any amount not paid through the date of surrender is still a part of the secured claim which must be paid. In the present case, the proof at the time of the hearing established that $2,080.04 remained owing on the original secured debt, of which the debtor was in arrears of approximately $800.00. The arrearage in the secured plan payments will remain a secured debt, accruing interest until paid.

In re Rimmer, 143 B.R. at 876.

The language in *Jock* and *Rimmer* that the secured creditor is entitled to payment of its secured claim through the time of

the surrender of the collateral is somewhat misleading since in each case the surrender was pursuant to a modified plan rather than entry of an order lifting the stay in order to allow repossession. Neither case addressed the precise issue before this court: whether a secured creditor is entitled to receive secured payments under a confirmed chapter 13 plan notwithstanding its repossession of the collateral.

As a general rule, this court agrees with the debtors' blanket assertion that a secured creditor is not entitled to payments as a secured creditor after it has sought and obtained repossession of its collateral. Thus, if the debtors had modified their plan at the time of the surrender to provide for payments to cease, Green Tree would have had no basis to object to the modification. But that is not what happened in this case. For some unknown reason, the debtors waited almost seven months before obtaining court approval for their proposed plan modification. As both *Rimmer* and *Jock* recognized, under § 1327(a) the confirmed plan binds the debtor and all creditors until it is modified. *In re Rimmer*, 143 B.R. at 876; *In re Jock*, 95 B.R. at 77. Because the confirmed plan provided for payments to Green Tree and this plan was not modified until July 23, 1998, the debtors are bound by the terms of the confirmed plan and may not recover from Green Tree the payments which it

received in accordance with that plan, notwithstanding Green Tree's possession of the collateral. *See In re Clark*, 172 B.R. 701, 703 (Bankr. S.D. Ga. 1994)("Under section 1327(a), the order of confirmation fixes the rights of all parties and binds them to the terms of the plan. Just as creditors are bound by the treatment afforded their claims, the debtor is likewise bound by the same terms.").

The debtors argue in their memorandum of law that a ruling in their favor on this issue "would prevent abuse by a creditor who stalls in taking possession of and selling the collateral." However, the debtors in this regard are not left at the mercies of a deleterious and delinquent creditor; instead, the modification process allows debtors, for the most part, to be the masters of their own destinies. It appears from the record in this matter that the parties reached an agreement for the surrender of the mobile home as early as December 16, 1997. In light of this agreement, nothing prevented the debtors at that point from moving to modify their plan to surrender the collateral and stop the payments to Green Tree. If this had taken place, it would be clearly irrelevant when Green Tree actually took possession of the mobile home since payments to Green Tree would have ceased as soon as the modified plan was confirmed. Similarly, the date of surrender is irrelevant to

the facts of this case as they actually occurred. The confirmed plan is binding and *res judicata* on all parties unless revoked or until modified. The debtors' efforts to avoid the consequences of their own confirmed plan through this adversary proceeding are ineffectual. Accordingly, Green Tree is entitled to summary judgment on this issue.

The final issue in the case is whether Green Tree is entitled to summary judgment on the debtors' claim for lot rent. The debtors concede in their memorandum of law that any recovery for lot rent is moot if the rent has in fact been paid directly to the landlord. Because the affidavit of Joel Jordan establishes that the lot owner's claim has been resolved, and the debtors admit that they otherwise have no direct claim for lot rent, summary judgment on this issue will be granted.

IV.

An order will be issued in accordance with this memorandum of law.

FILED: July 29, 1999

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE